Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of a Request for Review By Eureka Broadband Corporation of A Decision on Remand of the Universal Service Administrator	
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
Changes to the Board of Directors of the National Exchange Carrier Association, Inc.	CC Docket No. 97-21

PETITION FOR REVIEW OF DECISION OF THE UNIVERSAL SERVICE ADMINISTRATIVE COMPANY ON REMAND CONCERNING EUREKA BROADBAND CORPORATION'S FILING OF REVISIONS TO FCC FORMS 499-A

Pursuant to Section 54.719 of the rules of the Federal Communications Commission ("FCC" or "Commission"), 47 C.F.R. § 54.719, Eureka Broadband Corporation ("Eureka" or the "Company") as successor-in-interest to Gillette Global Network, Inc. ("Gillette" or "GGN") hereby respectfully requests that the Commission grant this request for an appeal of an "Administrator's Decision on Remand" of the Universal Service Administrative Company ("USAC").

STATEMENT OF INTEREST AND EXECUTIVE SUMMARY

Specifically, Eureka is disputing a decision by USAC, dated April 24, 2006, which would result in the application of a total of at least $310,782.12 in Federal Universal Service Fund ("FUSF") fees against Eureka.[1] As explained in greater detail herein and in prior submissions to the Commission, Eureka ***voluntarily approached*** USAC and the FCC to become

1 *See Administrator's Decision on Remand*, dated April 24, 2006, from Universal Service Administrative Company to Jonathan E. Canis, Esq. and Darius B. Withers, Esq. re: Eureka Broadband Corp., successor-in-interest to Gillette Global Network, Inc. (Filer ID # 820387) (*"Administrator's Decision"*), enclosed herein as *Exhibit A*.

fully compliant with its FUSF obligations pursuant to Section 254 of the Communications Act of 1934, as amended, 47 U.S.C. § 254. Nevertheless, USAC chose to, during the voluntary payment plan discussions, reject the filing of revised 499A Forms and to impose fees on Eureka, which would result in an excessive payment into the FUSF.

In particular, USAC has failed to recognize or acknowledge the unique factual circumstances surrounding this matter. USAC insists that Eureka has failed to provide sufficient documentation to support the proposed corrected revenue information contained in the Company's updated Form 499-A Forms. USAC ignores, however, the submission Eureka provided to USAC on January 10, 2005, which included an actual GGN Federal Tax Return from 1999.[2] USAC further ignored any reference to facts as described by Eureka associated with the Company's operations and lack of access to most of its records in the wake of the terrorist attacks on September 11, 2001. To ensure, therefore, that the equities of this matter are considered fully, Eureka is compelled to seek administrative relief from the FCC.

INCORPORATION OF PRIOR EUREKA SUBMISSIONS TO THE COMMISSION

As a preliminary matter, all prior submissions by Eureka in this proceeding regarding these and other related issues concerning Eureka's FUSF obligations and the nature of USAC's decisions are attached hereto and incorporated by reference to this Appeal.[3]

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2 *See Eureka Broadband Corporation's Request for Further Review and Submission of Supplemental Information*, from Jonathan E. Canis and Darius B. Withers, Counsel to Eureka Broadband Corporation to Universal Service Administrative Company, c/o Jeffery A. Mitchell, Esq., dated January 10, 2005 (*"Eureka USAC Appeal"*), enclosed herein as *Exhibit B*.

3 All prior submissions by Eureka to the Federal Communications Commission and the Universal Service Administrative Company are enclosed herein and incorporated by reference. *See generally*, Appeal of Decisions of the Universal Service Administrative Company Concerning Eureka Broadband Corporation's Revision to FCC Form 499-A and Application of Charges, dated September 30, 2004, (*"Eureka FCC Appeal"*)enclosed herein as *Exhibit C*.

STATEMENT OF FACTS AND USAC PROCEEDINGS AND NEGOTIATIONS

Corporate Background and Introduction: The FCC and USAC

Eureka is a New York City-based resale and facilities provider of telecommunications and internet services to business customers in New York, New Jersey, Maryland, Virginia, and Washington, D.C. Eureka offers businesses a single source for voice communications services, high-speed Internet, managed security services and data networking solutions. Eureka Broadband Corporation was established is 1998 and since that year acquired over seven companies including GGN in December 2000.

On May 10, 2004, Eureka (on behalf of GGN) submitted a retroactive filing of Form 499-As from 1999 through 2004 (representing revenues from 1998 through 2003) as well as a Voluntary Payment Plan proposal. In submitting these forms, Eureka initiated formal negotiations with USAC and began the process of working with USAC to identify its FUSF-based obligations. At the time Eureka submitted its Voluntary Payment Plan, neither the Company, nor USAC or the FCC, believed that GGN had previously filed any Form 499-As concerning revenue generated during the relevant time frame between 1998 and 2003. Therefore, in May of 2004, Eureka believed it necessary to submit the 499A Forms to come into compliance and commence the Payment Plan negotiation and acceptance process with USAC and the FCC.[4]

Rejection of Eureka's Voluntary Submission of Information

During the payment plan negotiation process, however, Eureka received an automatically generated letter from USAC advising Eureka that the new, "revised" FCC Form

4 *See Exhibit D*, containing May 10, 2004 *Letter re: Proposed Payment Plan Arrangements for Eureka Broadband* to Timothy Peterson, Federal Communications Commission from Counsel to Eureka, Jonathan E. Canis and Darius B. Withers, Kelley Drye & Warren LLP; *see also Exhibit C.*

499-As for the reporting years 2000 and 2001 (reflective of 1999 and 2000 revenues) were being rejected ("2000/2001 Revised Filing"). The stated basis for rejection of the "new", revised forms was that, unbeknownst to any participants in the discussions at the time, GGN had, in fact, filed a FCC Form 499-A in 2000. The information was not in Eureka's possession at the time of filing. Rather, Eureka only had the opportunity to review the aforementioned 499-A ***after*** the Company's initial document submission to USAC in May 2004. Upon review of the USAC-produced filing, Eureka deemed the revenue accounting calculations, utilized as the basis for the 499-A, to be completely erroneous.

Unfortunately, the "refilling" of a "new" 499 Form, according to USAC, violated USAC's policy that a carrier has no more than one year after filing a 499A Form to submit any adjustments to its reported revenues. Furthermore, USAC rejected Eureka's new, revised 2001 Form 499-A based on the identical policy. In fact, GGN ***never filed*** a Form 499-A for 2001. USAC, nevertheless, chose to estimate an amount due from GGN based upon its 2000 Form 499-A filing.

Payment Plan Negotiations and Filing of the an Appeal of the Administrator's Decision

At the time of the automated rejection by USAC, counsel for Eureka was actively discussing and negotiating, in good faith, with USAC and the FCC, the terms and possible conditions associated with Eureka's Voluntary Payment Plan. Eureka negotiated with USAC believing that, as part of the ongoing process, FUSF-eligible revenues reported in the rejected 2000 and 2001 Form 499-As, rather than the revenues reported by GGN, would form the basis for any final FUSF assessment calculations. Eureka and its counsel believed therefore that USAC's rejection of its 2000 and 2001 Form 499-As did not prejudice its proposed Voluntary Payment Plan, and that an appeal of these rejections was not immediately necessary.

USAC's Imposition of Fees and Rejection of Eureka's Proposals

This understanding changed on September 9, 2004, at a meeting between Eureka, its attorneys, and representatives of the Commission and USAC, in which Eureka was told that the FUSF-eligible revenues GGN reported and USAC assessed for 2000 and 2001, respectively, were considered by USAC to be part of the total FUSF liability calculations. This amount, \$250,373.23, which is the difference in FUSF-obligations Eureka may owe based on application of different revenue reporting is disputed by Eureka.

GGN's original Form 499-A filing for calendar year 1999, which was due April 1, 2000, was filed on or about September 20, 2000 ("September 20, 2000 Filing"). As Eureka has now discovered, GGN's September 20, 2000 499 Filing contained errors most likely caused by GGN's incorrect revenue allocation. To that end, GGN inadvertently: (1) overstated its long distance revenues; and (2) understated its local revenues and enhanced services revenues. Unbeknownst to Eureka, GGN corrected the errors and attempted to file a revised Form 499-A on or about April 20, 2001 (the "Attempted First Revised Filing"). This filing was rejected by USAC. In 2001, USAC did not receive a Form 499-A from GGN, and therefore estimated 2000 revenues from the inaccurate September 20, 2000 Filing.

As noted herein, on May 10, 2004, Eureka filed a Payment Plan Proposal and Form 499-As, reflecting revenues generated from 1998 through 2003. The forms were filed for three reasons: (1) to ensure Eureka was fully compliant with its regulatory payment obligations; (2) to provide USAC with information from which to formulate an amount that Eureka owed to the FUSF; and (3) to initiate discussions and negotiations between Eureka, USAC, and the FCC as part of the process of entering into a Voluntary Payment Plan for any outstanding FUSF balance. In accord with the process, USAC forwarded an Acknowledgement of this filing on

May 15, 2004, with an estimate of Eureka's outstanding balance based upon these forms. Through its standard operating procedures, on June 10, 2004, USAC sent Eureka a standard form letter notifying Eureka that its 2000/2001 Revised Filing, which represented revenues generated in 1999 and 2000, was rejected from consideration. The other Form 499-As, representing the years 1998, 2001, 2002 and 2003 were filed concurrently and accepted for filing, as there was no Form 499-A from Eureka or a related entity on already on file for these periods.

From this point forward, Eureka and its attorneys, engaged in discussions with representatives of the Commission, and USAC to discuss terms of the Voluntary Payment Plan. Eureka maintained the belief that any question of whether the revised filings would be accepted by USAC – ultimately – would be subject to and governed by these negotiations. Eureka continued to believe that in conjunction with its good faith negotiations that USAC would accept the previously (and systematically) rejected 2000/2001 Revised Filing and therefore incorporated into the Voluntary Payment Plan.

Based upon this belief, Eureka continued the negotiations in good faith, did not file an appeal of this decision with the Commission and awaited a response from USAC of the proposed Voluntary Payment Plan. On September 9, 2004, Eureka and its attorneys received absolute confirmation, for the first time, that USAC intended to include in the proposed Payment Plan obligation revenue amounts derived from the erroneous 499 Form GGN filed in 2000 and from the estimated Form USAC created to represent a hypothetical 2001 Form fling by GGN Therefore, formal notification of the rejection of the revenues, and the application of payments and penalties, occurred on September 9, 2004 in a face-to-face meeting between executives of Eureka, its counsel, and staff of USAC, including members of USAC's General Counsel's office and senior management.[5]

Eureka's Full Compliance with FUSF Payment Obligations

In the wake of these activities, Eureka executed a Promissory Note and Payment Plan Security Agreement with the Commission on October 15, 2004 to satisfy the Company's FUSF obligations. In fact, Eureka complied fully with its obligations under the Note and Security Agreement, having completed all payments required under the Plan on January 9, 2006, approximately two months ahead of schedule.[6]

LEGAL ARGUMENT AND QUESTIONS FOR REVIEW

I. THRESHOLD LEGAL ISSUES PREVENT COMMISSION ACTION IN CONSIDERING OR UPHOLDING USAC'S DECISION

In response to a Commission Public Notice dated March 16, 2005[7], Eureka submitted Comments in support of Petitions for Reconsideration of the Bureau's *Form 499-A Revision Order*,[8] filed by SBC Communications ("SBC"), Qwest Communications International ("Qwest"), and Business Discount Plan, Inc. ("BDP"). Moreover, Sprint Corporation ("Sprint") filed a Petition for Reconsideration of the *Form 499-A Revision Order*.

All petitioners argued that the *Form 499-A Revision Order* was both procedurally and substantively flawed, and that these flaws compel its vacature. To date, the various issues

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5 This fact is contrary to the implications in the Administrator's Decision that Eureka's filing may have been untimely; Eureka received no clear indication that an appeal of the rejection was necessary until September 9, 2004 (*see Administrator's Decision* at 4, fn. 12.)

6 A copy of correspondence illustrating Eureka's advance FUSF payment is enclosed herein at *Exhibit E*.

7 *Parties are Invited to Comment on Applications for Review and Petition for Reconsideration of Order Revising Instructions for Form 499-A*, Public Notice, DA 05-691, released March 16, 2005.

8 *Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Changes to the Board of Directors of the National Exchange Carrier Associations, Inc.*, Order, 20 FCC Rcd 1012 (*"Form 499-A Revision Order"*).

raised by the Petitions, and placed on Public Notice by the Commission remain unresolved and pending consideration by the Commission. Until such time as the issues outlined in those petitions are resolved, no action to affirm USAC's decision is appropriate.

For example, all parties and commenters correctly noted that the *Form 499-A Order* was not merely a procedural order, but effects substantive rule changes, which violates the Administrative Procedure Act, and exceeds the Bureau's scope of authority.[9] Notably, although USAC considers itself an entity independent of the FCC, the Administrator provided no comment in support of its actions or for the reasoning underlying the Commission's *Form 499-A Revision Order*.

Therefore, prior to considering the validity of the Administrator's Decision, the Commission should first consider and resolve the underlying legal and factual issues associated with this proceeding. As the Commission is aware, there remains a significant legal dispute over the degree to which the Commission may enforce USAC's decision.

II. USAC IGNORES CRITICAL FACTS ASSOCIATED WITH EUREKA'S PRODUCTION OF DOCUMENTATION THAT SUPPORT ACCEPTANCE OF THE COMPANY'S REVISED FORMS

As to the specific question of whether USAC received sufficient information to support the new, corrected revenue information,[10] USAC ignores the clear facts asserted in prior filings. As an initial matter, USAC ignores Eureka's production of tax returns for GGN in 1999. Notwithstanding the text of the Administrator's decision, Eureka submitted copies of corporate

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9 *See* CC Dockets No. 96-45, 97-21, *SBC Petition* at 7-10; *Qwest Petition* at 3-7; *BDP Petition* at 12-21.

10 *See Administrator's Decision* at 1, 5-6, *see also From 499-A Revision Order* at 20 FCC Rcd 1018.

tax returns of GGN from 1999, the relevant year for which revenues are disputed.[11] Revenues from 1999 formed the basis for reported revenues for the Year 2000 499-A, and for the revenues replicated by USAC for reporting year 2001. These records were obtained through Eureka's communications with third party unaffected by the September 11, 2001 tragedy, illustrating that Eureka did engage in the appropriate due diligence to comply with the Commission's mandate to produce reliable financial records.

Notably, the Administrator's Decision ***makes no reference*** to Eureka's submission of these returns. It is inconceivable that USAC could not examine the return and compare it to the reported amounts contained in the earlier GGN filing and the May 2004 Eureka filing to determine the accuracy of the revenue reporting. Apparently, based on the text of the *Administrator's Decision,* USAC made no effort to engage in this reasonably simple process of comparison, addition and subtraction.

As a further matter, USAC's reference and recitation of prior communications between USAC and GGN are misplaced. These references illustrate that USAC possesses the ability to conduct a comparison between the information contained in the Federal Tax Return for GGN in 1999 and information reported incorrectly by GGN in earlier communications. As summarized herein, the history of Eureka illustrates that there is sufficient basis to rely upon the authenticity of recently filed documents.

As noted earlier, Eureka Broadband Corporation was incorporated in 1998 and engaged in numerous acquisitions, including Eureka's subsidiary Gillette Global Network. Although each corporate acquisition increased revenues, each target company was distressed, and of particular importance for the instant matter, plagued with poor recordkeeping systems.

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11 *See Exhibit F* containing financial information provided to USAC by Eureka; *see also Exhibit B*.

Although under normal circumstances, the existence of a complex corporate structure would not prevent the disclosure of financial records to support modified Telecommunications Reporting Worksheets, the events of September 11, 2001 served as a significant obstacle in being able to produce the respective financial information. The Company, and its predecessor entity, is and was headquartered in downtown Manhattan at 39 Broadway. It serves numerous business customers in Manhattan that are connected to downtown switching facilities. Additionally, after much effort, in April 2001, Eureka secured from the Port Authority of New York/New Jersey a contract, which gave the Company the right to deploy a fiber-optic backbone conduit in the risers of #1 and #2 World Trade Center. On the eve of the September 11 terrorist attack, Eureka had invested over $500,000 in capital funds into the World Trade Center and was planning for the revenue from this facilities deployment to produce cash flow to grow its business, accelerate the merger integration process, and develop unified billing and Operational Support Systems.

Unfortunately, the disaster at the World Trade Center changed everything for Eureka. The collapse of the towers disrupted the entire power grid in all of lower Manhattan, which further disabled Eureka's entire New York network, and rendered its call records – and the revenue reports associated with that traffic – either unusable or inaccessible. Eureka, as a competitive new entrant, relied upon larger, facilities-based, entities to maintain redundant networks and record systems which could withstand such calamities. Nevertheless, the loss of AT&T's facilities in World Trade Center Tower 7, as well as the destruction of Verizon's West St. Central Switching Office, caused many of Eureka's customers, billing systems, and supporting information outside of the WTC complex to experience recurring service and retrieval problems for months following the disaster.[12]

In the immediate wake of the disaster, the Company struggled for over three years to comply fully with its regulatory obligations due to a lack of access to records and absence of personnel with relevant knowledge. This lack of access to records is the primary basis for why Eureka is unable to produce the specific "corporate financial records" cited by USAC and referenced in the Commission's *December 2004 499-A Revision Order*.[13] Notwithstanding USAC's position, Eureka has provided "an accurate and legitimate reason[14]" for being unable to provide the exact records requested by USAC and the Commission must account for this fact in rendering an equitable decision in this Appeal.

III. USAC'S REJECTION OF THE REVISED FORMS IS A PROMOTION OF FORM OVER SUBSTANCE

Eureka notes that USAC only rejected the 2000 and 2001 forms (reporting 1999 and 2000 revenues) because all other years listed in USAC's database were absent of a record of ***any*** filing data. USAC's rejection was not based strictly on the age of the forms, but rather the rejection was based further on the imposition of a policy that was suspect in its own right.[15]

The forms submitted by Eureka for 1999 (reporting 1998 revenues) and 2002 (reporting 2001 revenues), for example, were accepted by USAC, notwithstanding the fact that these forms contained no more (or less) indicia of reliability than the forms for submitted for reporting years 2000 or 2001. The argument that Eureka's filings lack reliability is inherently flawed because as USAC neglects to mention, the Company's May 2004 submission of a form

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12 *See Eureka FCC Appeal* at *Exhibit C, citing* May 5, 2004 *Letter to Timothy Peterson, Office of Managing Director, Federal Communications Commission, from Jeffrey Ginsburg, Eureka Networks*.

13 *See Form 499-A Revision Order* at 20 FCC Rcd at 1017-18, ¶ 13.

14 *See Form 499-A Revision Order* at 20 FCC Rcd 1018, ¶ 13.

15 *See infra*, Section IV.

for the 2002 reporting year (for 2001 revenues) was ***accepted*** by USAC.

Only because, at the time of filing, USAC's database did not contain an existing worksheet with the same corresponding Flier ID number for Eureka *f/k/a* GGN for the reporting years 1999, 2002, or 2003 did USAC ***not reject*** those forms. Conversely, only because a form existed in USAC's database for the years 2000 and 2001 did USAC reject the new forms filed in May 2004 from the "new" Eureka. This course of events illustrates the promotion of bureaucratic form over substantive evaluation of the facts.[16]

As noted herein, the sufficiency of the information Eureka is able to produce is limited by circumstances beyond its control – namely the access to certified financial statements from those specific periods. In preparing the forms in Spring of 2004, Eureka was forced to obtain, analyze, and compile all remaining financial information to produce the forms submitted to USAC. No further access to more contemporaneous records is now possible for the reasons associated with the destruction in the September 11, 2001 terrorist attacks.

IV. AN AFFIRMATION OF USAC'S DECISION CONTRAVENES ADMINISTRATIVE LAW AND POLICY

A. USAC's Decision Results in an Unjust and Inequitable Compensation

The Commission must not uphold USAC's decision because it will undermine any level of confidence the industry may hold regarding the reliability and consistency of the FUSF program. To date, carriers have reported revenues subject to FUSF contributions with the

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16 Notably, GGN ***never filed*** a Form 499-A in 2001 to account for its 2000 revenues. USAC created the form as an "estimate" that never reflected actual revenues for the relevant year. (*See Facsimile Cover Sheet* from Michelle Tilton of USAC to Tadas Vaitkus of Eureka in regards to GGN filings, attached as Exhibit 3 to *Eureka FCC Appeal*, enclosed herein at *Exhibit C*.) For USAC to impose these charges on Eureka, based upon an inaccurate revenue report reflects further elevation of form over substance. As USAC now possesses the accurate 2000 revenue information, the Commission's would support USAC's reversal of this earlier action. *See* 47 C.F.R §§ 54.709(d), 54.713.

understanding that if they over-report revenues and make excess contributions, the opportunity will exist to receive consideration for the amounts over-estimated.[17] To be sure, carriers have the incentive to be as accurate as possible in their filings, but as is evident from Eureka's case, unintentional and unforeseen mistakes inevitably will occur. If USAC's position prevails, carriers would not be confident that USAC will fairly address and resolve such honest mistakes.

Although the *Form 499-A Revision Order* may have affirmed, on a going forward basis, the USAC policy of rejecting any downward revisions in revenue reporting beyond one year, carriers such as Eureka remain penalized, unfairly, by USAC's prior enforcement of a suspect policy. A definable class of carriers continue to either face the burden of having previously overpaid into the Fund – which applies to one of Eureka's predecessors, GGN – or as applies to Eureka today, being threatened with the obligation to contribute more than their specific obligation. The end result of either scenario is that the Fund will be improperly overcompensated, thereby diminishing any future confidence in the fairness and objectivity of USAC as a fund administrator.

B. The USAC Position Regarding Rejection of Eureka Forms is Flawed

At bottom, USAC's procedural arguments against acceptance of Eureka's worksheets are flawed. As an initial matter, and as described in earlier filings, USAC's procedural policy is striking in its asymmetry. USAC has limited a carrier's ability to recover refunds beyond a date certain, but has accepted no corresponding limit on its own ability to conduct audits, impose changes to reported revenues, and collect under-payments. It is simply inappropriate for USAC to have such unequal and limitless discretion to recover funds from carriers, while imposing an apparently strict limit on the ability of carriers to obtain refunds.

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17 *Federal-State Joint Board on Universal Service, Petition for Reconsideration filed by AT&T*, Report and Order and Order on Reconsideration, 16 FCC Rcd 5748, 5733 at ¶12 (2001).

USAC justifies its policy in part with the argument that there are few "indicia of reliability" in Form 499 revisions beyond the one-year deadline. However, USAC cannot have it both ways. If USAC feels confident that sufficient indicia of reliability exist for it to recover under-payments after a one-year period, it should possess the same level of confidence that reliable indicia exist to support identification of over-payments and refunds due to a carrier, as the Commission's rules contemplate.[18]

The records and information which USAC requests, whether based upon the FCC's *Form 499-A Revision Order* or pursuant to guidelines contained in the Instructions to the FCC Form 499-A, were submitted by Eureka to USAC in prior submissions.[19] Furthermore, USAC has the ability to cross-reference, share, obtain, and compare information provided to it in a contributors' 499-A with information available to it in other US government databases, including Internal Revenue Service Records, a fact acknowledged by USAC and the FCC in the Form 499-A Instructions.[20]

V. NO RELEVANT AUTHORITY SUPPORTED USAC'S DECISION

At the time in which USAC rejected Eureka's worksheet, there was no statute, rule or regulation which would have allowed USAC to engage in such unauthorized rejection of what it termed a "revised" Worksheet. Section 254 of the Communications of Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), provides generally for the equitable and nondiscriminatory contribution by telecommunications carriers to mechanisms

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18 As noted herein, USAC has expressed no concern with the reliability of other forms submitted by Eureka for dates both before and after the 2000 and 2001 reporting periods. These dates are, nevertheless, beyond one year prior to the submission date of May 2004.

19 Indeed, Eureka has previously provided supporting information which would provide USAC with indicia of reliability concerning the financial status and reporting practices of Eureka and GGN. In the *Eureka USAC Appeal*, Eureka provided tax returns and USF contribution calculations certified by a corporate officer. *See Exhibits B* and *F*.

20 *See FCC Form 499-A Instructions*, at pages 1-2.

established by the FCC and the Federal-State Joint Board to preserve and advance universal service.[21] Although its existence was not mandated by the Act, USAC was established at the direction of the FCC as an independent not-for-profit entity with the sole function of administering the Universal Service Fund ("FUSF") and other universal service support programs.[22]

USAC's limited responsibilities are clear in the rules and regulations setting forth the scope of USAC's charter. Specifically, Sections 54.702(a) and (b) of the Commission's rules clearly state that USAC is responsible for administering the FUSF programs, including billing, collection and disbursement of FUSF funds. In addressing early concerns over the role of USAC, the Commission has emphasized that USAC's functions are to be "exclusively administrative",[23] noting that Section 54.702(c) expressly limits USAC's power by stating that USAC "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress."[24]

Despite the fact that USAC is clearly prohibited from establishing policy or addressing uncertainties in the administration of the FUSF on its own, it has clearly done so in this case. In rejecting Eureka's request, USAC relied on its "previously adopted policy," approved by the USAC Board of Directors during a USAC Board of Directors meeting on July 27, 1999, limiting the period for carrier-initiated adjustments to FUSF submissions. According to an Action Item entitled, "Recommended Deadline for True-Up of Form 457," USAC's staff

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21 47 U.S.C. §254.

22 *See 1998 Joint Board Order*, 13 FCC Rcd at 25064, 25065-66 at ¶¶ 12, 14.

23 *1998 Joint Board Order* at 25067 at ¶ 16 (*responding to comments of BellSouth, Sprint, and US WEST*), enclosed within the *Eureka FCC Appeal*, enclosed herein at *Exhibit C*.

24 47 U.S.C. §§ 54.702(c).

recommended the following to the Board:

> "[b]eginning with the September 1, 1999, data submission; carrier initiated requests for changes in reported revenues be limited to 12 months . . . . Changes to prior submissions as a result of an audit of a carrier's revenue reported on the Form 457 would not be impacted by the proposed limitation."[25]

USAC's staff offered the following rationale to support adoption of the recommendation:

> "Historically, USAC has accepted any changes in revenue information reported by telecommunications service providers, regardless of when the changes were reported. It is becoming increasingly burdensome administratively to continue accepting revisions to reported revenue information indefinitely . . . . Each time a change is reported that affects end-user billed revenue, it necessitates revising the service provider's billed amounts for the period impacted by the change."[26]

Regardless of the conclusions reached in the FCC *December 2004 Order* concerning the policy on a going-forward basis, the adoption of such a policy is completely unauthorized and inappropriate.

First, nowhere is statutory or regulatory authority cited to support the USAC policy and nowhere is any indication given that USAC consulted with the Commission prior to adopting the policy. Thus, the adoption of, and reliance upon, such a policy directly contravened express limits on USAC's discretion.

Second, USAC attempted to support its position by stating that Commission "regulations do not require USAC to accept any late-filed Universal Service Worksheets."[27]

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25 The specific resolution stated, "RESOLVED, That the USAC Board of Directors directs staff to no longer accept carrier initiated requests for changes in revenues reported on prior FCC Form 457 beyond 12 months from the initial submission of the Form in question." *See Action Item # aBOD05*, enclosed within the *Eureka FCC Appeal*, at *Exhibit C*.

26 *See Action Item # aBOD05*, enclosed within the *Eureka FCC Appeal*, at *Exhibit C*.

27 *See* Exhibit 3 of Eureka's *FCC Appeal*, enclosed herein at *Exhibit C*.

Eureka notes the corollary – namely, that no Commission regulations restrict USAC from accepting a worksheet, nor do any Commission regulations govern the process by which it will accept, consider, or reject any worksheets filed out-of time. Thus, USAC was without discretion to reject a corrected worksheet, whenever it is filed.

Third, even if USAC's past activities in adopting a one-year limit for acceptance of corrected FUSF filings is deemed to be justified and appropriate on a going-forward basis, such a limit was not properly adopted by USAC as an administrative policy. Rather, such a rule should be adopted by the Commission pursuant to normal notice and comment rulemaking procedures. A one-year limit is more than a mere administrative or organizational measure. It is a decisional rule with material adverse impact on contributors as well as on the FUSF as a whole. In Eureka's case, the automatic imposition of USAC's one-year limit clearly results in such a materially adverse impact, namely the imposition by USAC of over $300,000 in FUSF obligations and fees. USAC's prior adoption and imposition of such a rule, without public notice or comment, that results in the confiscation of a carrier's property without just cause, violates of basic notions of due process.

Finally, USAC should not and can not legitimately reject the filing of a revised 499-A form which accurately reflects the amount of revenue the Company generated in 1999 and 2000. The affirmation by the Commission of USAC's policy of limiting the revision of 499-A Forms will lead to substantial over-collection of FUSF contributions. In the case of Eureka, who came forward to USAC to meet its outstanding obligations, the over-estimation based upon the 2000 Form filed by GGN and the Estimate of the 2001 revenues would constitute a significant sum over the amount Eureka actually owes based on its actual revenues.

VI. THE COMMISSION SHOULD CONSOLIDATE THIS PETITION WITH SIMILAR PETITIONS FOR REVIEW OF USAC's DECISIONS

We understand other carriers are contesting identical aspects of USAC decisions regarding acceptance or rejection of their 499-A Forms. As such, judicial economy and the need for consistent rulings in administrative proceedings require that the substantive and procedural issues raised in this matter be addressed in a single, comprehensive proceeding.

CONCLUSION

In light of the foregoing, Eureka respectfully requests that the FCC reverse USAC's decisions and direct USAC to remove from consideration the disputed amount of $310,782.12 as applied to Eureka's FUSF balance.

Respectfully submitted,

Darius B. Withers

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Dated: June 23, 2006

EXHIBIT A

USAC **Universal Service Administrative Company**

Administrator's Decision on Remand

April 24, 2006

BY REGISTERED U.S. MAIL

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Washington, D.C. 20036-2423

Re: Eureka Broadband Corp., successor-in-interest to Gillette Global Network, Inc. (Filer ID #820387)

Gentlemen:

On May 12, 2004, Eureka Broadband Corporation (Eureka) filed with the Universal Service Administrative Company (USAC) certain annual Telecommunications Reporting Worksheets (Worksheets or FCC Form 499-As[1]) for the years 1999 through 2004 (reporting revenue for the years 1998 through 2003). On June 10, 2004, USAC rejected the 2000 and 2001 Worksheets (reporting revenue for 1999 and 2000, respectively) because they were submitted more than one year after the initial form due dates and resulted in the downward revision of previously billed federal universal service fund (USF) obligations. On September 30, 2004, Eureka sought review from the Federal Communications Commission (FCC) of, among other things, USAC's rejection of the 2000 and 2001 Worksheets (FCC Appeal).

Pursuant to the *Form 499-A Revision Order* issued in December 2004 by the FCC's Wireline Competition Bureau (WCB), the 2000 and 2001 Worksheets were remanded to USAC for reconsideration in light of the requirements set forth therein.[2] Having reviewed materials previously submitted to USAC and materials submitted to the FCC as part of Eureka's FCC Appeal, for reasons explained further below, USAC rejects the 2000 and 2001 Worksheets because Eureka has failed to provide adequate supporting documentation as required in the *Form 499-A Revision Order*.

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[1] Including FCC Form 457, the predecessor to Form 499-A.

[2] *See Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Changes to the Board of Directors of the National Exchange Carrier Association, Inc.*, CC Docket Nos. 96-45, 98-171, 97-21, Order, 20 FCC Rcd. 1012 (2004) (*Form 499-A Revision Order*).

Finally, to ensure companies had an adequate opportunity to establish good cause, the *Form 499-A Revision Order* permitted companies with pending or remanded revisions to supplement the record during the Open Period.[8]

Relevant Forms, Filing Deadlines, and Billing Periods

Worksheet	Filing Due Date	Associated USF Charges	Revenue Reported
2000 Form 499-A	April 3, 2000	July to December 2000	January to December 1999
2000 Form 499-S	September 1, 2000	January to June 2001	January to June 2000
2001 Form 499-A	April 2, 2001	July to December 2001	January to December 2000

Procedural Background

On September 5, 2000, a Eureka predecessor entity, Gillette Global Network, Inc. (GGN), filed its first Worksheet, the 2000 FCC Form 499-S, which had been due September 1, 2000. On September 21, 2000, GGN filed the 2000 Form 499-A, which had been due April 3, 2000. In November 2000, GGN began to receive invoices from USAC which, initially, reflected USF contribution obligations retroactive to July 2000. In December 2000, Eureka acquired GGN.[9]

In a letter dated April 27, 2001, David Ellen, General Counsel for "Eureka-GGN" submitted a revised 2000 Form 499-A to USAC. Mr. Ellen acknowledged late-filing of the revised form but requested the form be accepted "in light of a gross error" in the original filing. Other than Mr. Ellen's letter, Eureka-GGN included no supporting documentation in the April 27, 2001, submission. On August 1, 2001, USAC rejected the revised 2000 Form 499-A submitted by Eureka-GGN for failure to submit within one year of the original filing due date.

GGN failed to file a 2001 Worksheet, which was due April 2, 2001. Therefore, beginning in July 2001, USAC was required to estimate GGN's USF obligations for the period covering July to December 2001 based upon "relevant data … available" – in this case, GGN's original 2000 Form 499-A filed in September 2000.[10]

Eureka-GGN made no further Worksheet filings until May 2004. Between August 2001 and October 2002, GGN failed to respond to repeated efforts by USAC to contact

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[8] *Id.* ("Petitioners are permitted to supplement their filings to USAC as necessary [during the Open Period].").

[9] *See* FCC Appeal at 2.

[10] *See* 47 C.F.R. § 54.711(d) ("If a contributor fails to file a Telecommunications Reporting Worksheet by the date on which it is due, [USAC] *shall* bill that contributor based on whatever relevant data the [USAC] has available …".) (emphasis added).

Eureka-GGN regarding delinquent obligations and missed filings.[11] USAC continued to bill Eureka-GGN until, on October 1, 2002, after Eureka-GGN's continued non-responsiveness, USAC concluded Eureka-GGN had been sold or had gone out of business, closed Eureka-GGN's USAC account, and stopped all account activity, including billing and further assessment of late payment fees.

In April 2004, Eureka contacted the FCC regarding its USF filing and contribution obligations and, on May 12, 2004, Eureka filed Worksheets with USAC on behalf of itself and predecessor GGN for years 1999 through 2004. On June 10, 2004, USAC rejected the 2000 and 2001 Worksheets because they were received more than one year after their initial filing due date and would downwardly revise Eureka-GGN's previously billed USF contribution obligations.

On September 30, 2004, Eureka sought FCC review of USAC's June 10, 2004, rejection of the 2000 and 2001 Worksheets.[12] Among other things, Eureka explained, when Eureka filed the 2000 and 2001 Worksheets in May 2004, Eureka was unaware GGN had previously filed a 2000 Worksheet. Eureka further explained, "[u]pon review of [GGN's 2000 Form 499-A] filing, Eureka deemed the revenue accounting calculations, utilized as a basis for the [GGN 2000 Form] 499-A, to be completely erroneous."[13] Eureka stated that GGN's initial 2000 Worksheet inadvertently overstated long distance revenue and understated local and enhanced services revenues and Eureka correctly noted USAC relied on GGN's initial 2000 Worksheet (reporting 1999 revenue) to determine Eureka's 2000 revenues.[14] On December 9, 2004, the *Form 499-A Revision Order* remanded the 2000 and 2001 Worksheets to USAC for reconsideration.[15]

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[11] Eureka-GGN made no payments toward USF obligations between November 2000, when it received its first USF invoice, and May 2004.

[12] Although WCB has not remanded this question to USAC, Eureka's FCC Appeal was filed on September 30, 2004, more than 60 days after USAC's June 10, 2004, rejection letters, and so may have been untimely. *See* 47 C.F.R. § 54.720 (requests for review of a decision must be filed within 60 days of "issuance"). While Eureka claims it received "absolute confirmation" of USAC's decision rejecting the Revised Worksheets only on September 9, 2004, see FCC Appeal at 6, Eureka does not explain what form such confirmation took and why the June 20, 2004, rejection letters should not constitute "issuance" of USAC's decision for purposes of 47 C.F.R. § 54.720.

[13] *See* FCC Appeal at 3.

[14] *Id.* at 5.

[15] Eureka's FCC Appeal includes two other issues, neither of which was remanded to USAC for reconsideration: (1) USAC's refusal to reimburse Eureka for USF funds Eureka represents it previously remitted to an underlying carrier; and (2) USAC's imposition of late payment fees on Eureka's delinquent balances. *See* n.6, *supra*. Although the issue of late payment fees remains at the FCC, USAC notes the suspension of Eureka's USAC account between September 2002 and June 2004 due to Eureka-GGN's non-responsiveness during 2001 and 2002 caused Eureka to incur no late payment fees during the suspension period. Also, because Eureka failed to first report 1999 revenue until September 2000 and only reported 1998 revenue in May 2004, Eureka incurred no late payment fees on the un-billed USF charges associated with this revenue.

Discussion and Explanation of Decision:

The FCC directed USAC to consider two factors in establishing whether "good cause" exists to revise previously billed USF contribution obligations: (1) the carrier's "explanation of the cause for the change"; and (2) "documentation showing how the revised [revenue] figures derive from corporate financial records."[16] The FCC, in requiring supporting financial documentation, thus established a higher standard of proof than the self-certification which is otherwise sufficient for timely form filings. Moreover, to ensure carriers were not prejudiced by imposition of this higher standard, pending submissions (including the limited *Form 499-A Revision Order* remands) could be supplemented during the Open Period.[17]

USAC must reject Eureka's 2000 and 2001 Worksheets because Eureka failed to submit supporting documentation thus making it impossible for USAC to determine whether good cause exists for their submission. In particular, although Eureka provided an explanation for the revenue changes reflected in the 2000 and 2001 Worksheets, Eureka failed to provide any documentation "showing how [its] revised [revenue] figures derive from corporate financial records."[18] Eureka failed to provide supporting documentation notwithstanding being put on notice by the *Form 499-A Revision Order* of the standards under which USAC was required to evaluate revised Worksheets and notwithstanding having been expressly provided an opportunity to submit such support during the Open Period.[19]

Eureka asserts that the GGN revenue information reported and certified on the 2000 Form 499-A was "completely erroneous" because it overstated long distance revenue and understated local and enhanced revenue. While USAC sees no basis for doubting Eureka's assertions regarding the errors in GGN's 2000 filing, Eureka was required to and failed to submit required documentation illustrating or otherwise supporting the accuracy of the proposed corrected information.[20]

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[16] *Form 499-A Revision Order*, 20 FCC Rcd at 1018, ¶ 13 ("USAC shall only revise contribution obligations to the extent that the carrier has provided accurate and legitimate reasons for filing late and for revising the obligation.").

[17] *See id.* ("Petitioners are permitted to supplement their filings to USAC as necessary [during the Open Period].").

[18] *See id.* (citing 2004 Form 499-A Instructions at 11); *see also* 2000 FCC Form 499-A Instructions at 8 ("Revisions . . . must be accompanied by . . . documentation showing how the revisited figures derive from corporate financial records."); 2001 FCC Form 499-A Instructions at 9 (same).

[19] *See Globcom, Inc. d/b/a Globcom Global Communications*, Order of Forfeiture, FCC 06-49 (rel. Apr. 19, 2006) (relying in part on USAC's rejection of revised Worksheet due to failure to submit supporting documentation during the Open Period).

[20] Eureka submitted a considerable amount of financial information in connection with its application for an installment payment plan to resolve its delinquent USF obligations. Nevertheless, none of this information reached back to 1999 and 2000 or otherwise provided support for the Revised Worksheets.

Eureka emphasizes the 2001 Worksheet is not a "revision" because Eureka-GGN did not previously file a 2001 Worksheet and thus, the "revision" deadline cannot apply. However, as previously explained, when companies fail to file Worksheets, FCC regulations require USAC to bill those companies based upon estimated revenue. Thus, acceptance of the 2001 Worksheet would impermissibly decrease contributions to the USF well after the one year filing deadline established in the *Form 499-A Revision Order.*[21]

More significantly, however, the issue presented is not whether the 2000 Form 499-A filing was erroneous nor whether the 2001 Form 499-A filing was a revision or an "original." Rather, the issue is whether Eureka has provided sufficient documentation to support the proposed corrected revenue information as required by the *Form 499-A Revision Order*. Eureka has provided none.

Decision of the Administrator:

Eureka's request that USAC accept Eureka's revised Worksheets for the years 2000 and 2001, reporting 1999 and 2000 revenue, respectively, is denied.

To the extent the FCC Appeal raised issues other than USAC's acceptance of an untimely-filed Worksheet, those issues remain pending with the FCC.[22] If you disagree with USAC's decision, you may file a further appeal with the FCC. Detailed instructions for filing appeals are available at:

http://www.universalservice.org/fund-administration/contributors/file-appeal

Sincerely,

USAC

Universal Service Administrative Company

cc: Cathy Carpino, FCC Wireline Competition Bureau
Hillary DeNigro, FCC Enforcement Bureau
Regina Dorsey, FCC Office of Managing Director

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[21] Because USAC is required to bill USF contributions based on estimate revenue when companies fail to file Worksheets, estimated revenue effectively becomes filed revenue for purposes of considering whether future filings cause upward or downward departures from previously billed USF obligations. If there were no filing deadline for "original" filings, as Eureka contends, this would create a significant loophole for companies who fail to file Worksheets (as opposed to companies who do file but do so inaccurately). Such late-filed "original" filings could dramatically reduce USF contributions well after the one year filing deadline, thereby degrading administrative efficiency and certainty and undermining stability and sufficiency of the USF – stated purposes for the one year revision deadline. *See id*, 20 FCC Rcd. at 1016-17, ¶¶ 10-11.

[22] *See id.* (remanding to USAC only the portion of appeals that deal with untimely revised Form 499-A filings).

EXHIBIT B